

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

LYNN NOYES,	)	
	)	2:02-cv-2685-GEB-CMK
Plaintiff,	)	
	)	
v.	)	<u>FINAL PRETRIAL ORDER</u>
	)	
KELLY SERVICES, INC.,	)	
	)	
Defendant.	)	
_____	)	

The final pretrial conference scheduled for January 14, 2008, is vacated since the parties' Joint Pretrial Statement ("JPS") indicates this Final Pretrial Order should issue.

I. JURY/NON-JURY

All issues shall be tried to a jury.

II. DISPUTED FACTUAL AND LEGAL ISSUES

A. First Claim: Plaintiff claims she was discriminated against in violation of Title VII, 42 U.S.C. § 2000e-2(a)(1) when she was denied a promotion because she was not a member of a particular religious group. She seeks general, special and punitive damages for said violation, as well as her attorneys' fees and costs, including expert witness fees.

1 Defendant contends:

2 (1) The Fellowship is not a religious organization  
3 that would qualify for protected status, and therefore employment  
4 decisions allegedly based on membership or non-membership cannot  
5 support a Title VII religious discrimination claim;

6 (2) the claim is barred because Plaintiff failed to  
7 exhaust administrative remedies under Title VII;

8 (3) Plaintiff has failed to mitigate the damages  
9 alleged in the claim; and

10 (4) Plaintiff's claim for punitive damages is barred  
11 because Defendant did not ratify, authorize or have knowledge of  
12 the alleged conduct and the alleged unlawful conduct committed by  
13 former employee William Heinz cannot be imputed to Defendant  
14 because William Heinz was not an officer, director or managing  
15 agent of Defendant under California law.

16 B. Second Claim: Plaintiff claims that she was  
17 discriminated against in violation of the California Fair  
18 Employment and Housing Act, when she was denied a promotion because  
19 she was not a member of a particular religious group. She seeks  
20 general, special and punitive damages for said violation, as well  
21 as her attorneys' fees and costs, including expert witness fees.

22 Defendant contends:

23 (1) The Fellowship is not a religious organization  
24 that qualifies for protected status, and therefore Plaintiff's  
25 claim fails;

26 (2) The claim is barred because Plaintiff has failed  
27 to exhaust the required administrative remedies under FEHA;

1 (3) The claim is barred because accommodating  
2 religious preferences, or lack of religious preferences, would have  
3 resulted in an undue hardship to Defendant;

4 (4) Plaintiff failed to mitigate the damages alleged  
5 in the claim;

6 (5) Plaintiff's claim for punitive damages is barred  
7 because Defendant did not ratify, authorize or have knowledge of  
8 the alleged conduct and the alleged unlawful conduct committed by  
9 former employee William Heinz cannot be imputed to Defendant  
10 because William Heinz was not an officer, director or managing  
11 agent of Defendant under California law; and

12 (6) The claim is barred because Plaintiff  
13 unreasonably failed to take advantage of preventive or corrective  
14 opportunities.

15 C. Third Claim: Plaintiff claims that Defendant's  
16 actions were outrageous and with reckless disregard for the  
17 foreseeable consequences to Plaintiff and she seeks damages for  
18 intentional infliction of emotional distress.

19 Defendant contends:

20 (1) The claim is barred by the applicable statute of  
21 limitations;

22 (2) Plaintiff's sole and exclusive remedy is the  
23 California Workers' Compensation Act;

24 (3) Plaintiff has failed to mitigate damages alleged  
25 in the claim; and

26 (4) Plaintiff's claim for punitive damages is barred  
27 because Defendant did not ratify, authorize or have knowledge of  
28 the alleged conduct and the alleged unlawful conduct committed by

1 former employee William Heinz cannot be imputed to Defendant  
2 because William Heinz was not an officer, director or managing  
3 agent of Defendant under California law.

4 III. DISPUTED EVIDENTIARY ISSUES

5 Any evidentiary dispute capable of being resolved in  
6 limine shall be set forth in an in limine motion which shall be  
7 filed no later than 4:30 p.m. on February 4, 2008.<sup>1</sup> An opposition  
8 or a non-opposition statement to any filed in limine motion shall  
9 be filed no later than 4:30 p.m. on February 18, 2008. *Failure to*  
10 *state a basis for admissibility or non-admissibility of disputed*  
11 *evidence constitutes a waiver or abandonment of that basis.*

12 IV. WITNESSES<sup>2</sup>

13 A. The Joint Witness List was filed on January 7, 2008.

14 B. No person, other than those named on the witness  
15 list, will be permitted to testify unless:

16 (1) The party offering the witness demonstrates that  
17 the witness is for the purpose of rebutting evidence which could  
18 not reasonably be anticipated at the pretrial conference; or

19 (2) The witness was discovered after the pretrial  
20 conference and the proffering party makes the showing required in  
21 "C", below.  
22  
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24 <sup>1</sup> Before filing a motion setting forth an evidentiary  
25 dispute, counsel shall meet and confer for the purpose of trying to  
26 resolve that evidentiary dispute.

27 <sup>2</sup> This portion of the Order does not affect the parties'  
28 obligations to timely comply with witness disclosure requirements  
provided in the Federal Rules of Civil Procedure, the Local Rules,  
or by Order of this Court; and does not address the issue whether  
deposition testimony is admissible.

1 C. If a witness is discovered after this Order issues,  
2 counsel for the party offering the witness shall promptly inform  
3 the Court and opposing parties of the existence of the unlisted  
4 witness so that the Court may consider at trial whether the witness  
5 shall be permitted to testify. The witness will be not be  
6 permitted to testify unless:

7 (1) The witness could not reasonably have been  
8 discovered prior to pretrial;

9 (2) The Court and opposing counsel were promptly  
10 notified upon discovery of the witness;

11 (3) If time permitted, counsel offered the witness  
12 for deposition; and

13 (4) If time did not permit, a reasonable summary of  
14 the witness' testimony was provided to opposing counsel.

15 V. EXHIBITS<sup>3</sup>

16 A. The Joint Exhibit List was filed on January 7, 2008.

17 B. No other exhibits will be permitted to be introduced  
18 unless:

19 (1) The party seeking to use the unlisted exhibit  
20 demonstrates that the exhibit is being used to rebut evidence which  
21 could not reasonably have been anticipated at the pretrial  
22 conference; or

23 (2) The unlisted exhibit was discovered after the  
24 pretrial conference and the offering party makes the showing  
25 required in paragraph "C", below.

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26  
27 <sup>3</sup> This portion of the Order does not affect the parties'  
28 obligations to timely comply with disclosure requirements provided  
in the Federal Rules of Civil Procedure, the Local Rules, or by  
Order of this Court.

1 C. Any party proposing to introduce an exhibit which was  
2 discovered after the pretrial conference shall promptly notify the  
3 Court and opposing counsel of the existence of such exhibit. The  
4 Court will not permit any such exhibit to be introduced unless it  
5 finds:

6 (1) That the exhibit could not reasonably have been  
7 discovered prior to the pretrial conference;

8 (2) The Court and counsel were promptly informed of  
9 the exhibit's existence; and

10 (3) That the offering party has delivered a copy of  
11 the exhibit to opposing counsel, or, if the exhibit may not be  
12 copied, that the offering counsel has made the exhibit reasonably  
13 available for inspection by opposing counsel.

14 D. Plaintiff's exhibits shall be numbered and marked  
15 with colored stickers provided by the Court while Defendant's  
16 exhibits shall be designated by alphabetical letter also marked  
17 with colored stickers provided by the Court. To obtain stickers,  
18 parties should contact the Clerk of Court at (916) 930-4000.

19 The parties are directed to exchange with each other, at  
20 least twenty (20) court days prior to the date on which trial  
21 commences, copies of all of their respective exhibits, marked with  
22 exhibit stickers provided by the Court. Within five (5) court days  
23 after receipt and examination of the exhibits, each party shall  
24 file with the Court and serve upon opposing counsel objections, if  
25 any, to the exhibits, referencing the exhibits as marked by exhibit  
26 sticker and specifying the basis for each objection.<sup>4</sup> Failure to  
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28 <sup>4</sup> The parties have leave to file joint exhibits. The above  
(continued...)

1 exchange exhibits as ordered could result in the exhibit not being  
2 used at trial and/or the imposition of sanctions. The failure to  
3 make objections in the manner prescribed by this section shall  
4 constitute a waiver of objections. A party seeking to admit into  
5 evidence an exhibit to which no objection was made must identify  
6 said exhibit for the record and then move it into evidence.

7 Counsel shall produce all exhibits to the Clerk's Office  
8 no later than 4:00 p.m. on the Friday before the date on which  
9 trial is scheduled to commence. At that time, the parties shall  
10 also furnish the Court with a copy of each exhibit, unless the  
11 exhibit is physically incapable of being reproduced. Failure to  
12 produce exhibits as ordered could result in waiver of the right to  
13 offer those exhibits. Each party submitting exhibits shall furnish  
14 a list to the Court, the courtroom deputy and opposing counsel  
15 itemizing the exhibits.

16 VI. FURTHER PREPARATION FOR USE OF DISCOVERY DOCUMENTS

17 A. It is the duty of counsel to ensure that any  
18 depositions which are to be used at trial for any purpose shall  
19 have been filed with the clerk, and counsel are cautioned that a  
20 failure to discharge this duty may result in preclusion of the use  
21 of the unfiled depositions or in the imposition of such other  
22 sanctions as the Court deems appropriate.

23 B. No later than twenty (20) court days before the trial  
24 commencement date, counsel for each party shall serve on the other  
25 parties a statement designating all answers to interrogatories and  
26 all portions of depositions (except for passages to be used solely  
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28 <sup>4</sup> (...continued)  
procedure is designed for separate exhibits.

1 for refreshing recollection, impeachment or rebuttal). No later  
2 than ten (10) court days before the trial commencement date,  
3 counter-designations of other portions of these discovery documents  
4 may be served. No later than five (5) court days before the trial  
5 commencement date, the parties shall file and serve any preserved  
6 evidentiary objections to any designated discovery, or said  
7 objections are waived.

8 VII. FURTHER DISCOVERY OR MOTIONS

9 Pursuant to the Court's Pretrial Scheduling Order, all  
10 discovery and law and motion was to have been completed prior to  
11 the date of the final pretrial conference. That order is  
12 confirmed. The parties are, of course, free to conduct any  
13 additional discovery they desire pursuant to informal agreement.  
14 However, any such agreement will not be enforceable in this Court.

15 VIII. STIPULATIONS

16 The parties' stipulations on pages 11 (lines 24 to and  
17 including 27) and 12 (lines 2 to and including 8) of their JPS are  
18 part of this Order.

19 IX. SETTLEMENT NEGOTIATIONS

20 No settlement conference is scheduled in this matter. If  
21 the parties believe that a settlement conference would be  
22 productive and facilitate resolution of this case, the parties may  
23 contact the Court. If the Court schedules a settlement conference  
24 at the request of the parties, each party would be directed to have  
25 a principal with authority to settle the case on any terms present  
26 at the settlement conference.

27 In addition, each party would have to submit a settlement  
28 conference statement directly to the chambers of the settlement



1 judge, five (5) court days prior to the settlement conference.  
2 Such statements would not have to be filed with the clerk nor  
3 served on opposing counsel. However, each would be required to  
4 notify the other party or parties that the statement was submitted  
5 to the judge's chambers.

6 X. AGREED STATEMENT

7 The parties shall submit a short, jointly-prepared  
8 statement concerning the nature of this case that can be read to  
9 the jury at the commencement of trial. The statement shall be  
10 provided to the Court no later than ten (10) court days before the  
11 trial commencement date. If the parties fail to do this, they may  
12 be required to give their respective opening statements before voir  
13 dire. Separate statements shall be submitted if agreement is not  
14 reached.

15 XI. JURY INSTRUCTIONS, VOIR DIRE, AND VERDICT FORMS

16 A. Counsel are directed to confer and to attempt to  
17 agree upon a joint set of jury instructions and verdict forms.

18 B. All instructions, both general and specific, shall  
19 be submitted in the exact numerical order counsel desires them  
20 given to the jury and shall be tailored to the facts and issues in  
21 suit.

22 The joint set of instructions and verdict forms shall be  
23 filed fifteen (15) court days prior to the trial commencement date.  
24 As to instructions on which there is dispute, the parties shall  
25 adhere to the following procedure: 1) the party offering the  
26 disputed instruction(s) shall submit the instruction(s) as its  
27 proposed jury instructions, shall submit authority in support of  
28 the proposed instruction(s) and shall number the disputed

1 instruction(s) in a manner that shows where each disputed  
2 instruction should be placed in the tendered agreed upon  
3 instructions. The contested instruction(s) and supporting  
4 authority shall be filed with the joint set of instructions fifteen  
5 (15) court days prior to the trial commencement date; 2) the party  
6 opposed to the contested instruction(s) shall file opposing  
7 authority ten (10) court days prior to the trial commencement date.

8 C. All instructions shall be, to the extent possible,  
9 concise, understandable, and neutral statements of law. They shall  
10 be prepared in accordance with Local Rule 51-163. Ninth Circuit  
11 Pattern Instructions are preferred.

12 D. It is the parties' responsibility to ensure that  
13 jury instructions are submitted on all issues preserved for trial  
14 in accordance with the schedule set forth above. Pursuant to Local  
15 Rule 51-163, instructions not presented in accordance with this  
16 Order will be refused unless it is shown either (1) that the  
17 necessity for the request arose in the course of trial; the  
18 instructions could not reasonably have been anticipated prior to  
19 trial; and the request for such additional instructions is  
20 presented to the Court as promptly as possible; or (2) that the  
21 refusal to give such instructions would constitute manifest  
22 injustice under Rule 16(e).

23 E. Most of the examination of prospective jurors is  
24 conducted by the Court. The parties are directed to meet and  
25 confer and attempt to agree upon a joint set of proposed voir dire  
26 questions. These questions shall include any voir dire questions  
27 supplied by the Court that the parties believe are necessary. The  
28 joint set of voir dire questions shall be filed with the Court

1 fifteen (15) court days prior to the trial commencement date.  
2 Parties may also submit proposed voir dire questions which are  
3 disputed. Disputed voir dire questions shall be filed with the  
4 Court fifteen (15) court days prior to the trial commencement date  
5 and shall be accompanied by an explanation as to the need for the  
6 question and supporting case authority when available. The  
7 opposing party shall respond with reasons for the opposition and  
8 any supporting case authority no later than ten (10) court days  
9 prior to the trial commencement date. Each side is granted 15  
10 minutes to conduct voir dire following the Court's examination of  
11 prospective jurors.

12 F. The parties shall file a joint verdict form  
13 concurrently with proposed jury instructions fifteen (15) court  
14 days prior to the trial commencement date. See L.R. 51-163(e). A  
15 special verdict or interrogatories shall be included for all  
16 factual disputes submitted to the jury that must be resolved before  
17 questions of law can be decided, and for any other issue on which  
18 specific responses are desired. The verdict form shall be prepared  
19 in accordance with Local Rule 51-163(e). At the same time, where  
20 disagreements exist, the parties shall explain the disagreement and  
21 submit points and authorities supporting their respective  
22 positions.

23 At the time of electronically filing the jury  
24 instructions and verdict forms, counsel shall also submit a copy of  
25 the sanitized joint jury instructions, the sanitized disputed jury  
26 instructions, and the joint verdict forms to the Court by email to  
27 geborders@caed.uscourts.gov in accordance with L.R. 51-163(b)(1).  
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XII. USE OF STRUCK JURY SELECTION SYSTEM

Eight jurors will be impaneled. The "struck jury" system will be used to select the jury.<sup>5</sup> At the beginning of the voir dire process, approximately eighteen prospective jurors, randomly selected by the Jury Administrator, will be seated for voir dire. The order of the jurors' random selection is reflected by the order in which they will be seated. The first randomly selected juror will be in jury seat number one, which is at the extreme right-hand side of the jury box in the top row as the jury box is viewed from the well of the courtroom. The eighth juror will be in the eighth seat. The ninth selected juror will occupy the seat located at the extreme right-hand side of the jury box in the bottom row. The fifteenth seat will be in the left-hand side of that row. Three chairs will be placed in front of the jury box. The sixteenth juror will occupy the seat on the right and the eighteenth juror will occupy the seat on the left. The first eight jurors on a list, which shall be given to counsel, will constitute the petit jury unless one or more of those eight is excused for some reason. Assuming that the first and fifth jurors on the list are excused, the second listed juror becomes the first, and the other jurors' numbers are changed accordingly, with the ninth juror on the list

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<sup>5</sup> As explained in United States v. Blouin, 666 F.2d 796, 798 (2d Cir. 1981), "the goal of the 'struck jury' system is to whittle down an initially selected group . . . [to the amount of jurors] who will serve as the petit jury." The selected group consists of the jurors who will hear the case, plus the number of jurors required to enable the parties to use the combined number of peremptory challenges allotted to both sides for striking jurors from the group. Typically extra jurors are included in the select group in the event the minimum amount of jurors required for the "struck system" is reduced "for cause" or some other reason.

1 becoming seventh on the list; however, the jurors continue to be  
2 identified by their original numbers.

3 XIII. ATTORNEYS FEES

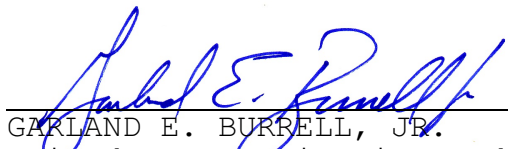
4 The parties are referred to Local Rule 54-293 concerning  
5 the post-trial procedure for seeking an award of attorney's fees.

6 XIV. TRIAL DATE

7 Trial to a jury will commence on March 25, 2008. A trial  
8 day will commence at 9:00 a.m. and will adjourn at approximately  
9 4:30 p.m. Each side has 15 minutes within which to make an opening  
10 statement to the jury and 90 minutes within which to make a closing  
11 argument. Counsel are to call Shani Furstenau, Courtroom Deputy,  
12 at (916) 930-4114, one week prior to trial to ascertain the status  
13 of the trial date.

14 IT IS SO ORDERED.

15 Dated: January 9, 2008

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GARLAND E. BURBELL, JR.  
United States District Judge  
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